

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF KAMPALA AT KAMPALA

CRIMINAL MISC. APPL. No. 70 of 2023

(Arising from High Court Cr Appeal No 104 of 2022)

**(Also Arising from Criminal Case No. 0568 of 2019 in The Chief Magistrates
Court of Kampala At Buganda Road)**

AISHA KUBIITA

.....

APPLICANT

Versus

UGANDA

.....

RESPONDENT

BEFORE: HON. MR. JUSTICE MICHAEL ELUBU

RULING

This application is brought under Sections 16 of the **Judicature Act**; Section 40 (2) of **The Criminal Procedure Code Act** and Section 205 of **The Magistrates Courts Act**.

The applicant, **AISHA KUBIITA**, seeks orders that:

1. She be granted bail pending the hearing and determination of her appeal No. 104 of 2022 against the judgment of the Magistrate Grade I in Criminal Case No 0568 of 2019 in the Chief Magistrates Court at Buganda Road
2. Any other orders as the court may deem fit.

Background

The grounds on which this application is premised are set out in the Notice of Motion and particularized in the attached affidavit of the applicant.

It is stated that the applicant was charged, tried and convicted by the Magistrates Court sitting at Buganda Road of the offences of Obtaining Registration by False Pretences contrary to Section 312 of **The Penal Code Act**; and Fraudulent Procurement of a Certificate of Title contrary to Section 190 (1) of **The Registration of Titles Act** Cap 190.

On the 16th of September 2022, the applicant was sentenced to a term of two and half years, on both counts, to run concurrently. The applicant thereafter filed an appeal No. 104 of 2022 with the Criminal Division, which she avers has a high probability of success.

That at the time of conviction, the applicant states she was the sole bread winner for her family with children who are minors and her stay in prison has greatly prejudiced their wellbeing. Besides there is high likelihood of delay in hearing her appeal owing to the busy schedule of this court.

That the offences of which she was convicted do not involve personal violence. She was also a first time offender. That she was granted bail by the trial court and complied with all the conditions set.

The applicant states that she has a fixed place of abode. That she also has substantial sureties able and willing to stand for her.

The state opposes this application.

In an affidavit deposed by Innocent Aleto, a State Attorney in the Office of the Director of Public Prosecutions, it was averred that it is not true that the applicant is presumed innocent by way of intended appeal as her conviction has not been overturned. In

addition, that the sentence meted out was not harsh or excessive in the circumstances. It was properly premised on legal principles.

It is also not true as stated, that the hearing of the appeal is likely to delay. That the allegation is speculative as the criminal division has a good record of disposing of cases. That because the applicant at this stage is a convict, with the sentence of two and half years weighing heavily on her, the temptation to abscond is very high.

Regarding proof of a fixed abode, the applicant has not shown that she has a fixed place of residence. Then the sureties produced are not substantial considering the nature of their relationships with the applicant.

In sum, the respondent stated that the applicant has not furnished satisfactory conditions for a release on bail.

Submissions

Both parties have filed written submissions which will not be reproduced here but have been closely studied by this court and will be referred to in resolving this matter.

Law Applicable

I start by laying down the principles that govern applications of this nature.

Bail pending appeal is provided for in Section 40 (2) of **the Criminal Procedure Code Act**. It stipulates,

The appellate court may, if it sees fit, admit an appellant to bail pending the determination of his or her appeal; but when a magistrate's court refuses to release a person on bail, that person may apply for bail to the appellate court.

Section 205 of **The Magistrates Courts Act** provides that an appellant may, at any time before the determination of his or her appeal, apply for bail to the appellant court, and the appellant court may grant the bail.

The appellate Court therefore has the jurisdiction to exercise its discretion whether to refuse or to grant an application made for bail pending the determination of an appeal.

The onus is on the applicant to satisfy the court why, in spite of being a convict, he/she should be released on bail. It follows therefore that the applicant must demonstrate why as a convict he should be released on bail.

That is the holding in **Lamba vs R 1958 EA 337** where it was held that when a person has been convicted, the onus is on him to show cause why the conviction should be set aside and similarly the onus is on him to show cause why as a convicted person he should be released on bail. If that is so, it follows that the reasons must be exceptional, otherwise bail would be granted in the majority of cases, which would clearly offend against the principle.

The Supreme Court has also set out what may constitute considerations by a court determining an application for bail pending appeal. In **Arvind Patel vs Uganda Supreme Court Criminal Application No. 001 of 2003** the Court held,

... considerations which should generally apply to an application for bail pending appeal ... may be summarized as follows:

- i. the character of the applicant;
- ii. whether he/she is a first offender or not;
- iii. whether the offence of which the applicant was convicted involved personal violence;
- iv. the appeal is not frivolous and has a reasonable possibility of success;
- v. the possibility of substantial delay in the determination of the appeal;
- vi. whether the applicant has complied with bail conditions granted after the applicant's conviction and during the pendency of the appeal (if any).

It is noted that these guidelines are not set in stone. Each case shall be weighed on its unique circumstances.

Determination

Whenever a court makes a consideration if to grant bail, the primary concern is whether the applicant will return for trial where a release on bail is granted. In this case the considerations should be even more substantial considering that, as a convict, the applicant has lost the presumption of innocence and has been convicted by a competent court.

Here, while it is true that the offence did not involve personal violence, it was nonetheless a serious offence. The court found that the applicant guilty of defrauding an 82-year-old man out of his land. I would be reluctant to comment on the merits of the appeal in an application for bail because it would, in my view, be prejudicial. The fact that the applicant was found to be a first time offender is noted but would not necessarily mean that she will not be tempted to abscond.

In view of the above, I find that the applicant has not shown what compelling circumstances make this matter unique demonstrating why despite being a convict she should be granted bail. None of the factors or grounds listed fit this billing.

In the result this application fails and is dismissed.

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Michael Elubu

Judge

13.7.2023